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# The Implicit Assumptions of Labor Law Scholarship

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## Making Sense of the Last Fifty Secondary Boycott Decisions, *or* How I Spent My Summer Vacations

James B. Atleson

I wish to discuss some problems inherent in the writing of law review articles, that is, problems in legal thinking and presentation. Many articles are designed to fit a particular model, a structure never explicitly taught, yet widely perceived to be inherently correct.<sup>1</sup> This model, however, contains implicit assumptions about law, many of which seem to be highly dubious.

If we looked at an article with a title similar to the one above, what would we discover? We would find, I believe, an organizational structure very similar to the following: (1) The Statement of the Problem, (2) Recapitulation of Prior Law, (3) The New Theory, and (4) The New Theory Applied.

This article will attempt to analyze the assumptions behind this structure and some reasons for its longevity. It focuses upon scholarly work in the labor field, the field known best to me. Whether articles in other fields fit this model is a matter of suspicion, but not knowledge.

James B. Atleson is Professor of Law, State University of New York at Buffalo. Versions of this article have previously been presented at the Law and Society Association Annual Meeting, Boston, Massachusetts, in June 1984, and at Osgoode Hall Law School, Toronto, Canada, April 1985. The author acknowledges the comments of Stewart Macaulay and Robert Bone, and colleagues David Engel, Alan Freeman, Tom Headrick, Fred Konefsky, and Jack Schlegel. The author is in their debt but they, of course, bear no responsibility for the views expressed.

1. Classroom teaching is only part of one's socialization into the profession. As law students, we read appellate opinions and articles and, as law review members, we mimicked the model of argumentation.

## I. The Structure of the Typical Article

### A. The Problem

Part A maps out the area of concern. Even if the focus is actually behavior such as economic pressure, the Problem is usually described or defined in legal terms so that discussion is immediately restricted by the limitations of legal language and by the conventions of legal style or legal writing. Often the problem will be stated broadly, far more broadly than subsequently will be discussed. The Problem is rarely discussed in its social or economic setting. Thus, the focus will be on already formulated legal categories rather than social situations, relationships or interaction. If the setting is historical, the history will normally be doctrinal (often two hundred years telescoped into a few paragraphs), history legitimated by appellate opinions, or, at best, the history of legislative action.<sup>2</sup>

### B. The Recapitulation

The *second* section is a recapitulation of prior law, usually discussing either general origins or particular sections of the statutes and summarizing "relevant" legal decisions. Relevancy is often based on pigeonholing legal categories or behavior—all secondary boycott or *all* lockout cases, even though, doctrinally, other areas are relevant in their underlying assumptions. Indeed, the very same statutory section may apply to other types of behavior.

The writer may believe that the law in the area is incoherent, irrational, or at least inconsistent with the statute, its language, or its policy. Typically, little of this will come out in this section, and there will be an attempt, perhaps even unconscious, to make the area seem somewhat consistent even though wrongheaded. (If not wrongheaded, why write on it?) As will be noted, the admission of incoherence may challenge our professional identification as lawyers.

The recapitulation may discuss in detail the unsettled questions or those expected to arise in the future. The unsettled questions, however, tend to come directly from the cases, that is, those questions raised but not decided (or clearly decided) by the decision makers. Focusing upon such legal issues may further skew our understanding of the context in which the problems arise or the way in which lawyers conceive of the situation. Since little work has been done on the actual activity of labor lawyers, these legal issues may not be questions lawyers treat with any frequency.

### C. The New Theory

The *third* section of the typical article presents the New Theory, the author's answer to the morass discussed in the prior section. This is the core of the article, where analytical ability is polished and "policy" honed to fit doctrinal needs. (This is the section on which tenure and promotion is often

2. In labor law, some of this may seem compelled by our focus on a statute, but the approach is not much different in common law scholarship.

based.) The very existence of this section implies dissatisfaction with existing doctrine either because it is incoherent or seemingly inconsistent with the statute, its language or its policies. Yet, the New Theory is often described as a fair "balancing" of the relevant interests, assuming that the various interests raised are those that are important, actually based on the statute, and can somehow, of course, be evaluated and given some discrete weight. This section also assumes that we know what the statutory policies are.<sup>3</sup>

#### D. The New Theory Applied

The *fourth* section of the article is the *application* of the New Theory. Often this section is meant to show that nearly all the prior law, already described as incoherent or a morass, is really *consistent* with the New Theory even though it was *not* the theory employed by the decision makers themselves. This is metaphysical law at its best, as if there were some invisible hand applying our own theory to these decisions even though the decision makers were unaware of it at the time. There must be parallels to this in the administration of other bodies of law, for instance, canon law.<sup>4</sup>

### II. Reflections on the Model

The longevity of the model is often attributed to law review editors. Although the problem is clearly broader, the student-run nature of law reviews may well be a partial cause. Although this may be beginning to change, it does seem that the narrow context in which the "problem" is perceived is determined not only by the conventions of legal writing but also by the desires of those who run law reviews. Years ago, an article of mine began with a discussion of work assignment (or jurisdictional) disputes, with some very unsophisticated economic and sociological material about the setting of work assignment disputes. The law review editors initially excised the introductory material, and I had to fight to get it reinserted. Their argument was "Of course, this is not law."<sup>5</sup>

3. This, as everyone knows, is often a dubious proposition. If the floor debate or committee reports clearly met the issue, lawyers would not be dealing with it. So lawyers or scholars generally find themselves in a twilight zone where the legislative history does not deal with the issues of the moment, and where general policies may give only dim light or may even lead to conflicting results. The search for "intent," of course, is clouded by the common practice whereby senators and representatives add or amend their comments *after* floor debate.
4. The final section of the typical article, before the conclusion, is often a miscellaneous problems section. Sometimes these areas or questions do not fit the New Theory, and, therefore, modifications have to be made in the theory to fit this unruly sector into the overarching theme of the article. At other times this section simply deals with tangential areas, areas which have been worked on, do not fit too well in the article, but are still too valuable to be lost in the small print of never-read footnotes.
5. The problem was a common one, at least at the time, and I remember an eminent labor law scholar telling me many years ago that he tended to take the most interesting portions of his articles and put them in nonlaw journals. My first big step was in moving sociology and history from footnotes to the text itself. Nevertheless, it was difficult, for instance, to find someone to publish an article that dealt primarily with the social setting in which wildcat strikes occurred. As I was told by the *Yale Law Journal*, "It does not have enough law for the readers of the *Yale Law Journal*." As consolation, in the same year the *Journal* rejected

The sociology of law reviews (and their contributors) is intriguing. Where do these notions come from? To some extent both the power and the concurrent insecurity of law review editors may cause a retreat into a narrow, even a pre-Realist view of the law. A lack of confidence may make it difficult for editors to accept an article markedly different from others they have seen and read. Student editors are highly—often overly—conscious of the review's importance to their institution's prestige and to their own careers. This breeds cautious adherence to tradition rather than risk taking.<sup>6</sup>

Law, after all, is found *also* in psychology, sociology, and history journals. Most law review editors (and maybe many scholars as well), however, doubt that nondoctrinal or social science information has significant relevance to law. This narrow focus must come mostly from the articles scholars write and the socialization that law students undergo. Law school presents students with the complexity and the undeniable fascination of a new world and, indirectly, tends to suggest the worthlessness of the students' prior education. This is not to deny that students often come to law school with firm expectations about law school education often based on little, if any, knowledge of the actual legal world.<sup>7</sup> But legal education plus a constant dose of appellate decisions teaches what kinds of information are relevant to the solution of legal problems. Law review writers and editors have performed well—in at least their first year—and they replicate the view of law promoted in their classes. High grades no doubt reinforce the correctness of that particularly narrow view of law.

A narrow view of law and relevance may result in an implicit model of legal scholarship—the appellate court brief. I certainly thought of my early articles as briefs, attempts to persuade appellate courts to chart a different, more rational, course. Frank Munger and Carroll Seron argue with considerable cogency that “legal scholarship is in fact a sophisticated and elaborated form of legal brief.” They argue that “doctrinal analysis, the chief method for legal scholarship, is undertaken to establish a particular

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Marc Galanter's justly influential “Why the ‘Haves Come Out Ahead’ ” (ultimately printed in 9 *Law & Soc’y* 95 [1975]) on the grounds that by the early 1970s, the poor no longer suffered a disadvantage in using the courts.

6. Student editors are legendary in their humorless approach to legal writing. In an article in which I sought simplicity, I noted that my readers, if any, were likely to be in the labor field and thus were apprised of the legal background. Thus I had eschewed footnotes and hoped that readers would assume that I had engaged in even more scholarly activity than the text and footnotes demonstrated. The quip, of course, was, excluded.

Fred Rodell put it well:

Moreover, the explosive touch of humor is considered just as bad taste as the hard sock of condemnation. I know no field of learning so vulnerable to burlesque, satire, or occasional pokes in the ribs as the bombastic pomposity of legal dialectic. Perhaps that is the very reason why there are no jesters or gag men in legal literature and why law review editors knit their brows overtime to purge their publications of every crack that might produce a real laugh. The law is a fat man walking down the street in a high hat. And far be it from the law reviews to be any party to the chucking of a snowball or the judicious place of a banana-peel.

Fred Rodell, Goodbye to Law Reviews, 23 *Vir. L. Rev.* 38, 40 (1936).

7. Thus one could expect very traditional reviews even at unconventional schools.

interpretation of caselaw on the basis of arguments and authority which would be acceptable to an appellate judge."<sup>8</sup>

In this sense, most articles are indeed like briefs; they marshal legal doctrine and rational argument to a particular end. Like a brief writer, the author begins with a predetermined emphasis, value position, or doctrinal attack. The research is focused upon doctrine, assuming it to be the foundation of the behavior of the legal system. Such argument may treat law autonomously, although in articles, much more than in briefs the political purpose or political effect of rules may sometimes (but not always) be acknowledged.

That articles are designed to persuade is not surprising, nor is legal scholarship thereby distinguished from writing in other fields. The problem, however, is that law review articles too often copy the limitations of scope and vision found in legal briefs and appellate court opinions. While the research may draw information from other disciplines, such knowledge tends to be used only to support the legal argument being advanced.<sup>9</sup> Such a limited focus can easily lead to misuse of the information provided by other disciplines and that in turn leads to criticisms of legal scholarship by scholars in other fields. Law review articles typically assume, usually without question, that human behavior is in fact affected, guided, or deterred by the particular structure of legal rules and sanctions under review. Finally, the historical or social context of the rules or areas investigated are not generally viewed as important unless "policies" can be intellectually intuited.<sup>10</sup>

Many have noted that legal scholarship reflects a desire to believe that legal rules and doctrine are autonomous—a belief important to the self-confidence or professional self-image of lawyers and law professors. In law, as distinguished from political science or sociology, for example, rules tend to be seen as generally or predominantly based upon legal thought rather than influenced by political or social developments.<sup>11</sup> If the Realists have not done so, certainly the critical legal thinkers have demolished the idea that "there is an autonomous and neutral mode of 'legal' reasoning and

8. See Frank Munger & Carroll Seron, *Critical Legal Studies versus Critical Legal Theory: A Comment on Method*, 6 *Law & Policy* 257, 260 (1984).

9. See, e.g., John Monahan & Laurens Walker, *Cases and Materials on Social Science in Law* (Mineola, N.Y., 1985). The purpose of this new "traditional law school casebook," as noted in the advertising flyer, is to "apprise the reader of the actual and potential use of social science in the American legal process and how those uses might be evaluated. We here view social science as an analytic tool in the law familiarity with which will heighten the lawyer's professional effectiveness and sharpen the legal scholars' insights." Rather than studying the "functioning of 'law' as a social system," it is the legal rules which "make the involvement [of social science] relevant."

10. My colleagues, Fred Konefsky and Jack Schlegel, have argued that the histories of law schools are also affected by the assumption that context is irrelevant to the growth or evaluation of particular schools, but, instead, change is roughly related only to the departure and accession of deans. Alfred Konefsky & John Schlegel, *Mirror on the Wall: Histories of American Law Schools*, 95 *Harv. L. Rev.* 833 (1982).

11. The problem is engagingly discussed by Robert Gordon, *New Developments in Legal Theory*, in *The Politics of Law*, ed. David Kairys, (New York, 1982).

rationality through which legal specialists apply doctrine in concrete cases to reach results that are independent of the specialists' ethical ideals and political purposes."<sup>12</sup> Nevertheless, the belief in an "autonomous and neutral mode" of legal reasoning pervades legal thought. Such a belief is generally found in summaries of prior law, the recapitulation section of the model review article.

These recapitulations are notorious for stressing the "evolving" law, reflecting the view that law develops in some natural, organic manner. There is an implicit and rarely explicit assumption that questions arise in a rational pattern and that decision makers not only are aware of the last case, but, also possess a desire or need to synthesize their case with those previously decided. The composite assumption is that both particular disputes and the actions of decision makers must be evolving in a natural manner.

We know that many Supreme Court decisions or new rulings by an agency do create a flood of new cases at the margins, leading to many tributaries or rivulets, and that those meandering curves are plotted carefully in law reviews. Why does this wrinkle writing tend to occur? To some extent, of course, law *is* partially planned in the sense that major actors (large employers or unions), or the government itself, will consciously select some issues to be litigated and, surely, those to be appealed.<sup>13</sup> But this cannot account for *all* the related issues that seem to bunch up at certain times. It may be that "open" questions of major decisions, having become known to experts in the field, are litigated simply because the recent decisions *are* known and noteworthy. Other issues, however, may arise rarely, over long periods of time; in their case, the law cannot be said to evolve any more than the law of torts can be said to evolve.

The nature of disputes in labor law, for example, has not changed fundamentally in over one hundred years. Most labor disputes and conflictual situations that arise have arisen before, although social, economic or technological developments may create a somewhat different context. A current decision may simply invest a common factual cluster with new significance, now thought to present new issues.<sup>14</sup> The perception of "newness," like the view that law evolves, must be imposed on the cases. It does not arise from them.<sup>15</sup>

12. See David Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *Stan. L. Rev.* 575, 578 (1984).

13. Repeat performers, in Galanter's terms, strive for clear rules, but—even more—for advantage.

14. I am indebted to Stewart Macaulay for this insight. Additionally, as my colleague Tom Headrick has suggested, lawyers may dissuade clients from litigating if little is at stake and the issue seems settled. On the other hand, if stakes are significant yet the rules seem settled and adverse, lawyers may help clients to reconceptualize the problem to provide a basis for litigation.

15. Nevertheless, students learn that cases make problems real. Here are two brief examples: (1) A colleague finds male students began to take the problem of battered wives more seriously when, after sociological articles are discussed, actual *decisions* are assigned. (2) Law review editors are hesitant to write articles on new or proposed legislation because "there aren't

A review of the predictions of future problems found in various sections of the model article would, I think, show somewhat embarrassing results. I have always wanted to analyze articles written after enactment of a new statute. These articles typically summarize and analyze the new act, attempting to predict those questions that will arise in its administration and application. My guess, based simply on subjective feeling and random inquiry, is that despite sincere efforts, the authors rarely predict those questions that indeed arise. Instead, they tend to discuss those which are fairly obvious and, thus, will probably not.<sup>16</sup>

I have often looked back at such articles to see what people were thinking when the particular statute was passed in an effort to understand current questions. Generally the authors have not predicted these issues. If this perception is accurate, we have a serious problem. It not only undercuts confidence in predictions in law review articles, especially those dealing with recently passed legislation, but also casts doubts on our ability to draft legislation to deal with current problems as well as those we think (and, in some sense, hope) will arise in the future. Legislators necessarily avoid facing all possible questions. As we know, they often avoid facing even foreseeable problems when such consideration might decrease the chances of passage.<sup>17</sup> Many issues are thus passed on to agencies or courts for resolution. Scholarly inquiry soon after passage is obviously hampered by the absence of actual cases, but these articles rarely predict the most serious questions which arise later. As cases do arise, scholarly inquiry, being generally reactive, focuses on these "new" developments. Thus too many problems receive no scholarly consideration until (and if) they come up in actual cases.

The section setting forth the New Theory is perhaps the most revealing. Many articles conclude either that the agency or court (generally the Supreme Court) has misapplied an otherwise proper balancing test or that it has failed to apply the correct one. Balancing tests, however, describe only a process for decision making. Since they do not lead clearly to any particular result, they have doubtful value in explaining the past or predicting the future.<sup>18</sup> Nor does the normal argument that "there must be a line or a

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any cases yet." A related phenomena is that students find that problems *and assigned decisions* become real when the same cases are discussed by a practitioner, no matter how boring and unimaginative the presentation.

16. The method by which predictions are made is worthy of study. Do scholars anticipate likely behavior, perhaps affected by the statute, and measure such activity against the statute, or is analysis primarily devoted to linguistic inquiry?
17. A classic statement of legislative punting can be found in the legislative history of the Sherman Anti-Trust Act. The chairman of the House Judiciary Committee stated that "now just what contract, what combinations in the form of Trusts, or what conspiracies will be in restraint of trade or commerce, mentioned in the bill, will not be known until the courts have construed and interpreted this provision." Cong. Rec. vol. 21, pt. 5, p. 4089, cited by Judge Woods to permit broad judicial construction of the Act in *U.S. v. Debs*, 64 F. 724 (U.S. Cir. Ct., N.D. Ill. 1894).
18. See, for example, what are essentially balancing tests used by the NLRB to determine whether an appropriate bargaining unit should be one of the employer's workplaces or many. The problem can be seen by Robert J. Rabin's perceptive separation of the "law" of



limit," common throughout labor law scholarship, explain *why* the line should be drawn at any particular point.<sup>19</sup>

It is quite possible that a minuet is being played in this section, with arguments about consistency, relevancy, or statutory responsiveness masking the author's hostility to the social, political, or economic values or assumptions that decision makers seem to be employing. For some reason, labor law scholars tend to be leery of directly confronting values or even issues of power.<sup>20</sup> Yet, the reliance on pure doctrine can mask our own values or even the contradictions in our normative beliefs. Alternatively, doctrinal arguments may serve as a code, communicating that the author and the readers share basic values. This allows discussion of issues within a broad set of normative beliefs without apparent commitment to any particular value choices.<sup>21</sup>

I may not have been correct in *Values and Assumptions in American Labor Law*<sup>22</sup> in using the Wagner Act as the basis from which many of my arguments flowed. The Wagner Act may not have had the potential to alter those values and assumptions that existed in the law of the nineteenth and early twentieth centuries, and thus the decisions that flowed from that act and its amendments may not at all be inconsistent with the policies of the act. But if this is true, if the Wagner Act was "intended" (in some metaphysical way) to continue the basic economic and social assumptions of the past, then why is *this* never discussed?<sup>23</sup>

Most critically, how can we deal with the New Theory unless we know why the *prior* law is incoherent or irrational? Why is it we assume that another, but new, theory, no matter how rational, has any chance of acceptance without knowing why the situation is as bad as the author believes it to be?

These thoughts were stimulated by a recent conversation with another labor scholar. In the second section of a recent article he brilliantly and effectively demolished what passed as reasoning in a recent Supreme Court decision. Without trying to analyze why these justices could be so irrational,

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unit determination from the "reality." See James B. Atleson, et. al, *Collective Bargaining in Private Employment* 113-25, 2nd ed. (Washington, D. C., 1984). Another example is the Board's multifactor test for deciding § 10(k) work assignment disputes. For an article blithely ignoring but nevertheless unconsciously struggling with the questions raised here, see James B. Atleson, *The NLRB and Jurisdictional Disputes: The Aftermath of CBS*, 53 Geo. L.J. 93 (1964).

19. This argument is routinely used in dealing with statutory limitations on union activity to justify the status quo. I have recently written on two examples within this category: attempts to engage in coordinated bargaining and secondary boycotts. See James B. Atleson, *Reflections on Law, Power and Society*, Md. L. Rev. (forthcoming 1985).

20. See *e.g.*, *id.*

21. These thoughts were based on the views of Robert Bone of USC Law School.

22. Amherst, Mass., 1983.

23. Some seem to want to have it both ways at once. The law is autonomous, a real thing, they will argue—at least until you show that it is not. Then they will concede that "of course" the function of law is to support the social order, and law is indeed politics. See, *e.g.*, Ernest Van Der Haag, *Politics Against Law*, 82 Mich. L. Rev. 988, 989-90 (1984).

he followed with a section setting forth his new theory. I suggested to him that the new theory should rest on an inquiry into the *reasons* for the Court's silliness. He responded that he was more interested in utilitarian goals, that is, in developing an approach that decision makers might accept. I do not denigrate the value of work that offers, novel, compelling arguments to advocates or decision makers. Given the actual success rate of such articles, however, their continuation is a fascinating phenomena.

I think it is fair, but surely controversial, to say that most law review articles, no matter how brilliantly done, have had little impact on decision makers, at least directly, although I concede that influence may be extremely difficult to discover. It would be wrong to assume that articles have no effect, for it would be difficult to gauge the long range impact of scholarship filtered through the process of legal education. The problem is that influence is hard to measure and clear evidence of impact is generally absent. Nevertheless, articles, especially by professors on elite faculties and writing in elite journals often seem to have an impact at least upon legal discourse if not on the course of legal decision making.<sup>24</sup>

If the constraints on legal scholars are truly imposed by decision makers, e.g., appellate judges, then how can this be explained? Few articles are of course cited, which suggests that few are used by the advocates. I am not sure what the explanation is, because I am sure that more articles are read by advocates than are cited in their briefs. In any event, except for a few examples, Brandeis and Warren on privacy is traditionally cited, articles rarely seem to have affected judicial results. The explanation for this may be that we have not tried hard enough to understand why the law is incoherent and irrational. Unless we attempt to explain this we do not know why decision makers are acting as they are, and if so, it seems obvious that there is little hope that they will follow our "New Theory."

If the problem with prior law is not that the decision makers have not thought about it with sufficient clarity, but that there is another agenda according to which existing law is rational in some sense, or at least less irrational, then how can one believe that a New Theory has any chance of being accepted? And if the author is not really interested in acceptance, why write in this way? I am not simply accusing others, because I have written my share of this kind of article. Indeed, the model sketched here is taken directly from some of my prior efforts. I am not certain where I learned the model and was even unaware that I was following one. I suspect the model flows from the received wisdom passed on to us in law school.

It is also possible, although not common, to view statutes as hollow vessels with no inherent content. At least one colleague believes this (knows it actually), and it is a disturbing assumption. Most scholars simply deny

24. Statements of purported facts will often be uncritically believed. Philip Schuchman has observed that a "persuasively stated argument by a well-known law teacher published in a prestigious law journal, though it was based largely on anecdote, will be uncritically accepted as though it contained true statements about the effects of the legal system on society and business firms." Philip Schuchman, *Problems of Knowledge in Legal Scholarship* A-12 (1979).

such a disturbing notion; their articles assume that legislative policy and, more important, legislative *answers* can be found. From this premise, problems are seen to flow not from the decision maker's values but, rather, from mistakes or judgmental errors. The articles assume that a clear and well reasoned argument will sway decision makers from their mistaken ways and to the path of true virtue.<sup>25</sup>

Most articles make these assumptions, despite evidence that court rulings seem little affected by the quality of legal scholarship. Students involved in moot court arguments and practitioners, for instance, share a conviction that the outcome would have been different if their argument had been better phrased or differently focused. When pressed, however, practitioners often have a far more realistic view of the legal world than is presented in legal writing.

Another very practical and serious problem is a belief that we can understand the prior law in terms of the language used to decide the cases. We assume that both the case and the way decision makers reacted to it can be understood from appellate reports. That report comes, however, at the end of a long process, and generally contains only a summary of a very full, detailed record.<sup>26</sup>

Professors who are arbitrators must know that their opinions explain the result in only a limited sense. Much that really explains the decision *in the arbitrator's mind* is not put in the opinion, either because the arbitrator does not want to embarrass one of parties or for some other reason. This need not be motivated by a sense of self-protection or a wish to hide basic values, but can come from an honest belief that the parties will live with the result better if it is explained in a certain way. In "hall talk" discussions with arbitrators, one often learns, for instance, that a numerical ceiling was created in an overtime distribution case because of prior twisting of contractual language by a cynical personnel manager, or that a decision for the employer was narrowly confined because the arbitrator disliked the generally applied arbitral rule. These examples could be expanded

25. Stewart Macaulay's comments on the value of the classical model of contracts to those without political or economic power seems particularly apt:

Judges are supposed to respond to reasoned argument, and if their decisions importantly affect behavior, then a single skilled advocate or author of a law review article, armed only with reason, could right wrongs by persuading judges. Not only would the powerless win, but the legal professional who championed their cause would need to do only honorable and enjoyable things in order to help them. The champion works through appeals to reason and intelligence, and talks of economic and social norms, the "findings of science," efficiency, or some other highly valued body of thought. Problems of politics, interest, power, and dominance need not be faced because they do not appear to be relevant in the world of doctrine, where it is assumed that right ideas will be crystallized into rules that are self-enforcing.

Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 *Law & Soc'y* 507, 521 (1972).

26. Relying on National Labor Relations Board decisions raises another problem because most of us often read the extracted reports in such services as the Bureau of National Affairs rather than the entire board case or the much longer and fuller decision of the administrative law judge.

indefinitely.<sup>27</sup> If law professors know this of their own experience about arbitration awards, why assume that judicial decision makers do not write opinions in the very same way? I realize that legal decisions need not necessarily be viewed this way. I am merely expressing doubt, but a doubt that can infect the whole enterprise.<sup>28</sup>

In *Values and Assumptions*, I primarily argued that the received wisdom, primarily the conventions of proper legal analysis, could not explain many of the significant decisions in labor law. The “wisdom,” acknowledged in most law review articles, is that disputes should be resolved in light of the stated statutory purposes and policies of federal labor laws, derived primarily from their legislative history and the text of the statutes. This framework for legal thought and analysis often leads scholars to find that adjudicators either have not coherently justified the decisions they have reached or have not rationally placed those decisions within the received wisdom. The tendency is to conclude that faulty analysis, poor logic or simple whimsy explains the result. This kind of conclusion, it seems to me, assumes that the Realist movement never occurred. A more modern, but still a distinctly minority, response is to argue that all law must be incoherent because it is based upon a set of contradictions in liberal ideology. Since humans are not basically consistent in thought or action, however, the inconsistency of legal actors is not particularly surprising. Thus, the presence of inconsistencies or even of contradictions, the focus of much of critical legal work, is not too exciting by itself.

Contradictions and incoherence may appear to exist, in part, because of a failure to acknowledge that a set of economic or social values and assumptions underlies legal decisions. The decisions could then be viewed as coherent, but only because an agenda exists outside the traditional legal mode of analysis. Yet this agenda is not unknown to most labor scholars. When pressed outside the context of normal law review writing, labor law scholars widely agree, for instance, that a crucial legal assumption is that the *continuity of production* must be maintained unless statutory language ‘clearly permits and protects employee interference. This conclusion helps to explain more of labor law than most of the elegant, logical analyses found in law review articles.

The next step is to discover where these assumptions come from and how they are culturally enforced—so that, for instance, similar values can be found in opinions of nineteenth century judges.<sup>29</sup> This leads to a focus on social history, and it raises doubts about not only lawyers’ reliance upon legal reasoning, but about the kind of training lawyers receive. Here, again,

27. It is also true that the arguments presented to the arbitrator are often affected by aspects of the employment or union relationship which may be independent of the merits.

28. This doubt is not related to any debate about whether adjudication *in fact* is basically decision and then rationalization or whether it actually involves the weighing of competing rationales. Whatever the approach, the issue is whether we can intelligently *understand* the opinion solely from its language.

29. See, e.g., James B. Atleson, *Values & Assumptions in American Labor Law*, chap. 3 (Amherst, Mass., 1983).

there is much work to do. For instance, if I am correct in believing that at least some of labor law doctrine can be explained by a set of social and economic values or assumptions, what is the source of these views? Lawyers seem uncomfortable in dealing with such issues.

### III. Beyond the Model

I believe it is fair to say that the model sketched here fits a substantial portion of labor law writing. No doubt it is easier to write articles following this model, and, given the pressures on scholars and the traditions of legal writing, the continuity is understandable. Yet the typical article contains assumptions that seem unproven and may well suggest that our time could be better spent in other ways. I find myself agreeing with Fred Rodell's pungent conclusion: "There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground."<sup>30</sup>

Mark Tushnet has noted a similar structure in constitutional law articles:

The typical constitutional law article today has a standard form. The author identifies a doctrine developed in recent Supreme Court cases, notes some difficulties in the internal logic of the doctrine, indicates that the doctrine seems incompatible with the results of other cases, suggests minor modifications in the doctrine to make to consistent with those cases, and concludes that the doctrine as modified—almost uniformly into a balancing test—provides a sensible way of achieving results without going too far.<sup>31</sup>

Tushnet argues that the articles assume a "necessary connection between Supreme Court decisions and principles of justice." On a higher level of abstraction, my colleague Alan Freeman has argued that the production of liberal scholarship is part of creating a "legitimizing ideology that makes the world appear as if it were not the one we live in, that makes it seem legitimate, that holds out utopian promises while ensuring their nonattainment, that cuts off access to genuine possibilities of transformation."<sup>32</sup> The seeming function of scholarship is to present a world characterized by harmony more than conflict, one in which shared values are present.

Tushnet identifies a variety of ways that liberals in the 1970s approached troublesome decisions or doctrines.<sup>33</sup> One mode tries to link results with certain principles of fairness, "to superimpose a facade of rationality on the Court's decisions."<sup>34</sup> There is often talk of implicit models and assumptions that "articulable principles of justice exist," oddly relying on court decisions as indications of such principles.<sup>35</sup>

Disturbing doctrines may be accepted, perhaps grudgingly, with modifications, even though those modifications would lead to results which

30. Rodell, *supra* note 6.

31. Mark Tushnet, Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies, 57 Tex. L. Rev. 1307, 1322 (1979).

32. Alan D. Freeman, Truth and Mystification in Legal Scholarship, 90 Yale L.J. 1229, 1235 (1981).

33. Tushnet, *supra* note 31, at 1325-34.

34. *Id.* at 1325.

35. *Id.* at 1326.

will be *opposed* by a majority of the Court.<sup>36</sup> Moreover, if existing doctrines and proposed alternatives are readily manipulable, Tushnet asks how we can assume that *any* constitutional test can dictate a particular set of results?<sup>37</sup>

Many of Tushnet's insights apply to labor law scholarship. Like liberal constitutional law scholarship of the 1970s, the labor writing has generally been reformist and liberal, usually arguing for more sympathetic treatment of unions or employees and relying upon the stated policies of the NLRA. Many of techniques noted by Tushnet are commonly used.

These observations pose substantial dilemmas for legal scholars who want to write. One alternative is to continue writing about doctrine but to use doctrine to uncover thought patterns or legal consciousness.

Despite their profound insight that law is historically contingent and not inevitable, critical scholars often show an ironic tendency to ignore historical and cultural context. The concept of "legal consciousness" may be vastly overinclusive. The phrase is generally used without reference to which persons or groups share the relevant views. Use of the phrase often carries an unproven assumption that the consciousness of legal decision makers, *e.g.*, appellate judges, is shared by others. The views of judges may indeed reflect the consciousness of others, but that cannot be *assumed* to be true in all cases.<sup>38</sup>

Legal scholarship in this mode becomes a form of intellectual history. Much of this work is done by critical legal scholars, and is very useful on the whole. Doctrinal analysis can be used to decode social, economic, or political values, although "examining the ways in which lawyers produce ideological pictures" may not really help us understand how these pictures influence social relations.<sup>39</sup> It may be that the views embedded in legal consciousness legitimate existing social relations by making these relations seem necessary, inevitable, or even desirable. Yet, legal anthropologists suggest that the connection between formal law and anyone's consciousness is at least problematical, and workers, as much as anyone else, may reject dominant beliefs about appropriate social relations.

The issue is exceedingly complex. Workers may criticize the unfairness of existing social relations, look around, and then conclude "still, this is the best country in the world." Michael Mann has suggested that workers are unlikely to adopt the values embedded in law. They may combine a clear awareness of particular injustice with a broad acceptance about the necessity and justice of existing social relations.<sup>40</sup>

36. *Id.* at 1327.

37. *Id.* at 1329.

38. See David M. Engel & Barbara Yngvesson, Mapping Difficult Terrain: Legal Culture, Legal Consciousness, and Other Hazards for the Intrepid Explorer, 6 Law & Policy Q. 299 (1984).

39. See Trubek, *supra* note 12, at 590.

40. Michael Mann, The Social Cohesion of Liberal Democracy, 35 Am. Soc. Rev. 423, 435 (1970), discussed in Trubek, *supra* note 12, at 613-15. Similarly, Joseph Femia argues that workers "express a great deal of agreement with the dominant ideology" while

Moreover, formal rules of law, as expressions of state policy, would always seem to have a legitimating function, and the basic problem may be in stressing the significance of rules and procedure, rather than viewing law in a broader, sociological perspective. Thus, doctrinal work may tend, unintentionally, to solidify the traditional view that doctrine is important and that the law is autonomous of social reality or, at least, mediated by a normative system. Moreover, such analyses may strengthen the all-too-common assumption that law is always or necessarily an important factor in explaining human values or behavior and that economic or social developments are less important than legal rules or legal thought.<sup>41</sup>

Thus, a critical failing in both traditional legal scholarship and much critical scholarship, is the belief that law is a decisive factor in social behavior. These assumptions ignore strong evidence that legal rules often have little impact on society or on belief structures or, as I have recently argued, that economic forces such as capital concentration may be far more important than the NLRA.<sup>42</sup>

Some, perhaps in recognition of these problems, may turn to nondoctrinal research. Much more of this work needs to be done in the labor field. So much turns on "pop" sociological or "pop" psychological views of the behavior of people and institutions (for example, on what parties and their lawyers do and think). An author may, for instance, advance a New Theory in the secondary boycott area hoping that it will help the parties and their lawyers predict the legality of various kinds of pressure with greater precision. That assumes, however, that union lawyers are consulted *prior* to the initiation of secondary pressure. If unions tend to act first, calling their counsel only when charges are filed or injunctions sought against them, then predictability has no practical relevance.<sup>43</sup> A New Theory might help courts decide these cases, of course, but that is a far different aim than predictability.

Although we have much to learn from the social study of law, that work also is filled with problems, not the least are the methodological problems inherent in this kind of research.<sup>44</sup> Often, such research seems to confirm the

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concurrently revealing "not outright dissensus but nevertheless a diminished level of commitment to the bourgeois ethics, because it is often inapplicable to the exigencies of his class position." Joseph Femia, *Hegemony and Consciousness in the Thought of Antonio Gramsci*, 23 Pol. Stud. 35, 46 (1975). As Trubek notes, however "elite consciousness may be an important part of a system of control, even if it is rejected by the Mass" (614-15).

41. See Atleson, *supra* note 19.

42. *Id.*

43. Predictability may nevertheless have value. Once burned, unions might conform their behavior to the law. The problem, though, is the unlimited variation in factual situations which make labor law difficult to predict even when rules are fairly clear-cut, a situation unlikely to be common in secondary boycott cases. Predictability may also be relevant even if unions are aware of the rules but decide to ignore them, for then the predictability of the rules can be used to support the fairness of the legal response.

44. Legal scholars often become "turned off" to social science research because even studies found to be interesting or even useful are often criticized for seemingly persuasive methodological reasons.

very social assumptions with which the researcher began.<sup>45</sup> Some techniques can be used only for certain questions, leading researchers to look for problems where those methods can be used,<sup>46</sup> even though the problem may not be terribly important. As Stewart Macaulay has stated, "The research may be impeccable, but a rigorous answer to a silly question is still a silly answer."<sup>47</sup>

It is valuable to know whether administrative regulation of representation elections rests upon sound empirical assumptions, and it is important for legal regulation of employer and union speech during representational campaigns to know whether employees remember or are affected by what is said during such periods.<sup>48</sup> One wonders, however, why a more important question would not be whether the promise of legal protection for employees held out by the NLRA has any practical reality and, if not, why not. In any event, once sound information or insights are gathered, inescapable policy choices nevertheless remain. If employees do not remember much about what was said during a union representation period, does that mean they were not affected? If only 19 percent of the employees actually changed their minds during the representation campaign, is this an insignificant number? And, irrespective of numbers, what values should be enunciated through the system of rules *irrespective* of provable effects? The whole model sketched above suggests that lawyers are very uncomfortable talking about underlying value assumptions. Thus, social research is often treated as if it speaks for itself, as if substantive conclusions follow directly from numbers, graphs, and even observations.

This perception is not limited to lawyers' forays into empirical, nondoctrinal research; similar problems exist in straight nonlegal research. For instance, according to the chosen methodology in a famous study, it could not be proven that the media affected an election, therefore, it did not!<sup>49</sup> A similar conclusion is reached by Getman, Goldman, and Herman in their study of union representation elections. Their data would not support a conclusion that employer coercion affects employee voting patterns, and they therefore conclude that coercion has no effect.<sup>50</sup>

45. See, e.g., James B. Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience*, 34 *Ohio St. L.J.* 750, 761-76 (1973).

46. Methodology is the basis of the professional identity of a social scientist just as doctrinal analysis is the specialty of the lawyer. See John Schlegel, *An Irrelevancy, Perhaps*, 6 *Law & Policy* 307, 308 (1984). The investment in particular types of methodology or form of doctrinal analysis is readily apparent whenever scholars gather to discuss these matters.

47. Stewart Macaulay, *Law and the Behavioral Sciences: Is There Any There?*, 6 *Law & Policy* 149 (1984).

48. The most thorough empirical study thus far on regulation of representation elections is Julius G. Getman, Steven B. Goldberg & Jeanne Herman, *Union Representation Elections: Law & Reality* (New York, 1976).

49. See generally, Bernard Berelson, Paul Lazerfeld & William McPhee, *Voting* (Chicago, 1954).

50. As one might expect, the methodology and conclusions of this study have been challenged, and it is argued that a "more sophisticated methodology" would show that opposing conclusions could be reached with the same data. See William T. Dickens, *The Effects of*



More serious yet, many of the studies I have read, on workplace conflict for instance, are driven by the *same assumptions* I find in judicial decisions, that is, workplace problems stem from communication breakdowns, not conflicts of interest, or employee involvement or happiness should be heightened because productivity is the prime value. There seems little recognition that employees often view the workplace as a place of disorder, or that the researchers possess political or social values of their own which flow through their research.

Finally, we have to be aware of the limits to which empirical or behavioral research can be put. I stress usefulness because lawyers have a practical sense about the work that they do—they generally want to see some results. Lawyers tend to be uncomfortable with the notion that new information, apart from utilitarian purposes, is valuable. Thus, they tend to feel that critique by itself is unsatisfactory. To a large extent, lawyers' instrumental motivations are shared by legal scholars, even though the scholars' world is less constrained by immediate practicality.

Serious anxiety is introduced when a researcher, believing in the instrumental value of legal research, pursues social science research. After spending a year studying social science materials on workplace conflicts while trying to analyze the law of wildcat strikes, I finally realized that no matter how good the research, the cases would probably come out the same anyway.<sup>51</sup> That insight led directly to *Values and Assumptions*.

Concededly, there is much value in doctrinal work that seeks to unmask hidden assumptions, that searches for legal consciousness. And empirical work, focusing upon the actual belief systems and actions of people and lawyers, is immensely valuable. Lawyers can indeed look at the social context in which law exists. My colleague David Engel's studies of Sander County provide a rich understanding of the relationship of formal law and the beliefs of average citizens.<sup>52</sup>

And now an explicit *mea culpa*. Following existing conventions of scholarship. I have written a number of articles, some very long, paralleling the form and purpose sketched here—legal briefs for what I thought were more progressive, more liberal, or fairer results. Only later did I realize that, given the decisions I disliked, the courts would not be likely to accept "more rational" formulations that would lead to better, *i.e.*, fairer results.

Why did I write them? Perhaps I wanted to believe that the rule of law prevailed. Perhaps I was just not strong or confident enough to resist the force and attraction of "The Form." We begin with the hope of accomplishing some socially good deed by presenting an argument

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Company Campaigns on Certification Elections: Law and Reality Once Again, 36 Ind. & Lab. Rel. Rev. 560 (July 1983); Paul Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA, 96 Harv. L. Rev. 1769, 1781-86 (1983).

51. Atleson, *supra* note 45. Moreover, an emphasis on rules which excludes context and behavioral data tends to assume that sanctions will be effective.

52. See David Engel, The Oven Bird, 18 Law & Soc'y 551 (1984); David Engel, Legal Pluralism in an American Community: Perspectives on a Civil Trial Court, 1980 Am. Bar. Found. Res. J. 425.

appellate judges might accept. The spirit of Brandeis and Warren spurs us on by providing some reason to believe that success is possible. Besides, law is a rational process, isn't it? We also know that law students, acting as editors, feel comfortable with "The Form."<sup>53</sup> More important, so do some law school deans and promotion and tenure committees.<sup>54</sup>

The leading articles, and the book reviews too, are for the most part written by professors and would-be professors of law whose chief interest is in getting something published so they can wave it in the faces of their deans when they ask for a raise, because the accepted way of getting ahead in law teaching is to break constantly into print in a dignified way.<sup>55</sup>

If we carefully "balance interests," we demonstrate basic fairness and open-mindedness. Even if wrong, one cannot cause too much trouble by urging incremental change. After all, doctrinal work distinguishes us from scholars in other fields. It provides relatively easy puzzles that can be handled in an article of normal length and, indeed, problems that can actually be solved.<sup>56</sup> We also get read, sometimes, and cited, sometimes, by others in our field, a gratification not to be ignored. To the extent professors read articles in their field, an open empirical question, writing may affect teaching and, in turn, lawyers and then judges. Or so we hope.<sup>57</sup>

The form of law review articles, moreover, reflects not only the common modes of legal thought but also the primary rationalization for law. The modern justification for law is "less concerned with the expression of values than with the realization of practical goals conceived in utilitarian terms and pursued according to canons of scientific reasoning."<sup>58</sup> Just as judges and legislators must explain their actions as being related to some legitimate goal, legal scholars also tend to seek new or modified legal rules or procedures to satisfy some social or political aim. Thus, the justification for legal scholarship is its attempt to direct policy makers, not to paths of

53. The desire of law review editors for "precision" knows few bounds. An edit of one of my recent articles contained three citations to a case mentioned in one paragraph: once when the case name was cited, once for the page on which the "holding" was mentioned, and a third time for a statement of the case's significance. This is a problem, not of the id and the ego, but of the *id.* and the *ibid.*

54. My dean induced me to see the rationality of using the modifier "some."

55. Rodell, *supra* note 6, at 44. Rodell also noted that the students writing "for the law reviews are egged on by the comforting thought that they will be pretty sure to get jobs when they graduate in return for their slavery, and the super-students who do the editorial or dirty work are egged on even harder by the knowledge that they will get even better jobs."

56. By destroying the notion that law is science, the Realists, to some, threatened the nineteenth-century professional status of lawyers. For an attempt to create a new basis for a professional, and thereby elite, status, see Bruce Ackerman, *Reconstructing American Law* (Cambridge, Mass., 1984). Ackerman's "new language of power" would be based upon the work of Coase, Kant, and liberal law. Gerald Frug has argued, however, that the proposed new language "will empower particular people—those who speak the language—and will enable them to enhance and legitimate their power by fostering particular definitions of truth." Gerald E. Frug, Book Review, *The Language of Power*, 84 Col. L. Rev. 1881, 1893 (1984). Frug argues that we need to form "nonhierarchical communities of interest" and, thus, a language "that nurtures equality and mutual respect rather than deference to professional expertise" (at 1894).

57. Many of these thoughts were stimulated or suggested by Stewart Macaulay.

58. Richard L. Abel, *Law Book and Books About Law*, 26 Stan. L. Rev. 175, 186 (1973).

true virtue, but, rather, to ways of achieving utilitarian goals.<sup>59</sup> As lawyers then, we must attempt to redirect doctrine to carry out legislative or public policy, for such accomplishment is the function of law.

Even while I was in law school, I knew that the legal method, involving the “balancing” of interests or stressing neutral principles or process, did not accord with instincts about how the world worked. Subsequently, when I began to teach, I felt that the leading articles in the field assumed a process or mode of rationality which did not reflect the reality I vaguely thought existed. The period of questioning and self-doubt lasted many years, until I was sufficiently convinced that something was profoundly wrong with post-Realist, but really non-Realist, scholarship in labor law. It hid subjective choice and valuation under a veneer of rationality and operated as if the political world were largely extraneous. Such legal thought does not represent the world as we know it, and it will not become real by continuing the hope or pretention that it will come to pass.<sup>60</sup>

The very form articles take indicate a belief in the rule of law, often a neutral rule at that. I believe and have written that the language in both articles and decisions of courts and agencies tends to mask the political, social, and economic values being implemented. I had not previously focused on the form of law review articles, but the argument, I think, is the same. The form masks the ideological or value content of the decisions or conclusions reached. In the case of law review articles, the form pretends that values are not being applied by courts and administrative agencies or, if applied, that the values are deeply shared and uncontested.<sup>61</sup>

There is a deeper reason why this might be the case. In the 1950s and the early 1960s, the beginning of the legal world for me, there was a perceived need by liberals to find some mechanism for controlling the state and its abuses—a reaction, perhaps, to the cold war and the McCarthy period. There was need to create a legal ideology that would limit the power of the state. Liberal ideas of the rule of law may well have suited that task by providing a way in which we could believe, or perhaps assert, that the state should live up to its promises and apply law in a neutral (that is, not authoritarian) manner. Although the argument could probably be stretched back to the 1930s or the 1940s, my law school education seemed to hold that this belief was required so that the real power centers in society, which would otherwise tend to reach conclusions and take actions with which we did not agree, might be controlled. I remember the glee with which some of my classmates and I read the early Warren Court decisions, overturning decisions in our casebooks, and we noted the surprising discomfort these opinions caused some of our most liberal professors. The Warren Court forced us to recognize value choices that could not be hidden in neutral or

59. It is no surprise that the gap between “law in action” and “law on the books” is seen as a serious problem. See *id.* at 184-87.

60. The efforts of critical legal scholars would perhaps have saved me much time and effort if they had begun fifteen years ago.

61. See Atleson, *supra* note 29, chap. 3.

process language. The attack on the Warren Court from the right may be related to the acceptance of the End of Ideology.<sup>62</sup> The great social and economic problems had been solved and “all that remained was to keep the great machine running smoothly—a maintenance job for technicians.”<sup>63</sup>

When we look at the model of most law review articles, we see an image of the legal system we know not to be true. We know there is no inherently rational scheme. We know that if prior law is not consistent, a new theory will not necessarily have predictive value or be acceptable or even useful, except in a very strange analytical sense. Authors are satisfied to have “rationalized” the area so that it makes sense at least to them, is consistent with what they believe the statutes mean (with all the problems inherent in these assumptions), and meets the various competing interests. This is what law students call the “True View,” that is, not the law but the professor’s view of the law—not what exists, but what *should* exist in some perfect world, which does not now exist and which, I think we know, will not exist in the future.

62. One of the most influential books during my college days was Daniel Bell, *The End of Ideology* (New York, 1960).

63. Grant Gilmore, *The Ages of American Law* 105 (New Haven, Conn., 1977).